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No. 87-470

IN THE

Supreme Court of the United States

October Term, 1987

FORT WAYNE BOOKS, INC.,

Petitioner,

vs.

STATE OF INDIANA, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Indiana

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and

RONALD W. SAPPENFIELD, FANTASY ONE, INC., and FANTASY TWO, INC.,

Petitioners,

vs.

STATE OF INDIANA,

Respondent.

On Writ of Certorari to the Court of Appeals of Indiana, First District

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MOTION OF SPARTACIST LEAGUE AND PARTISAN DEFENSE COMMITTEE FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS, AND BRIEF ATTACHED

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MOTION OF SPARTACIST LEAGUE AND PARTISAN DEFENSE COMMITTEE FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS, AND BRIEF ATTACHED.

MOTION OF SPARTACIST LEAGUE AND PARTISAN DEFENSE COMMITTEE, FOR LEAVE TO FILE A BRIEF, AS AMICI CURIAE, IN SUPPORT OF PETITIONERS, AND BRIEF ATTACHED.

STATEMENT

The Spartacist League and Partisan Defense Committee hereby respectfully move for leave pursuant to Rule 42 of the Rules of the Supreme Court to file the attached joint brief, amici curiae, in support of the petitioners, Fort Wayne Books, Inc., Ronald W. Sappenfield, Fantasy One, Inc., and Fantasy Two, Inc. Attorneys for petitioners have consented thereto and letters to that effect are filed with this Court; the consent of the attornies for respondents was requested but refused.

THE INTEREST OF AMICI CURIAE

The Spartacist League is a Marxist political organization with a history of over twenty years of activity in the United States, including running candidates for public office, holding classes and public forums on Marxist history, international and domestic politics, and publishes a bi-weekly newspaper, Workers Vanguard, a journal of the Women's Commission, Women and Revoltion, and a theoretical journal, Spartacist.

The Partisan Defense Committee is a class-struggle, non-sectarian legal defense organization in accordance with the political views of the Spartacist League. It gives aid and support to cases and causes in the interest of the whole of the working people.

The Spartacist League seeks to act, as Lenin described the role of the vanguard workers party, as a "tribune of the people." Thus the Spartacist League opposes all aspects of social oppression, whether stemming from race and national hatred or from the repressive sexual morality enforced by the state and bourgeois family.

As materialists, amici curiae understand that attempts today to proscribe sexuality and particular sexual practices (and their depiction in pornography) necessarily reflect the attitudes, values and prejudices shaped by class society.

The Spartacist League has a long-standing position against government regulation of private life. Amici curiae do not advocate any particular sexual practices, but define their position essentially in the negative: against this state's attempts to censor, limit

and cripple human sexual expression in the service of its own reactionary ideology.

The issue presented in these cases is whether the government can criminalize First Amendment communicative materials, seize and destroy them and imprison their distributors--simply by alleging "obscenity". In these cases the government applied the most powerful weapon in its legal arsenal to an area of social concern inseparably connected to humanity's most public and most private worlds--opinion and sex. The current battleground is personal freedoms--focused on the three-letter word "sex." The battle cry of the government and its religious surrogates is the "protection of morality, family, children."

These cases represent government's frontal assault on First Amendment protection of the spoken and written word,

books, films, and the right to publish and distribute communicative material. The starting point is the current majority position of the Supreme Court that the First Amendment in not an absolute--that an "obscenity" exception exists. The established tests for "obscenity" are subjective, imbued with religious considerations, and justified on the basis of a false history of the First Amendment obscenity exception.

Until now, it has been a principle of constitutional law that communicative material is protected by the First Amendment and is not "obscene" until there has been a judicial determination. Even where materials are considered "obscene," due process mandates apply. This is axiomatic, a minimum condition for the First Amendment to have meaning.

The application of RICO provisions to anti-obscenity laws abrogates First

Amendment protection for communicative materials. Under RICO an ex parte ruling of probable cause that two or more individual items are "obscene" can legally justify the seizure of all other First Amendment materials owned by the alleged offender, without a trial or judicial determination. The prosecutor can choose venue in order to best secure initial forfeiture and then conviction.

Thus these cases pose in stark relief whether the First Amendment is fact or fiction; whether by an Orwellian turn of phrase books, magazines, and video movies can be transformed from First Amendment materials to fruits of racketeering.

In view of the foregoing, amici curiae seek leave to file the attached brief.

Respectfully submitted,

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Dated: New York, New York
May 12, 1988

BRIEF OF SPARTACIST LEAGUE AND PARTISAN DEFENSE COMMITTEE, AS AMICI CURIAE, IN SUPPORT OF PETITIONERS.

STATEMENT

The Spartacist League and Partisan Defense Committee submit this brief, amici curiae, in support of the petitioners, Fort Wayne Books, Inc., Ronald W. Sappenfield, Fantasy One, Inc., and Fantasy Two, Inc., having submitted a motion for permission to file same.

INTEREST OF AMICI CURIAE

The Spartacist League is a Marxist political organization with a history of over twenty years of activity in the United States, including running candi-

dates for public office, holding classes and public forums on Marxist history, international and domestic politics, and publishes a bi-weekly newspaper, Workers Vanguard, a journal of the Women's Commission, Women and Revolution, and a theoretical journal, Spartacist.

The Partisan Defense Committee is a class-struggle, non-sectarian legal defense organization in accordance with the political views of the Spartacist League. It gives aid and support to cases and causes in the interest of the whole of the working people.

The Spartacist League seeks to act, as Lenin described the role of the vanguard workers party, as a "tribune of the people." Thus the Spartacist League opposes all aspects of social oppression, whether stemming from race and national hatred or from the repressive sexual mo-

rality enforced by the state and bourgeois family.

Social bigotry, racism and religion are the ideological concomitants of the drive against "godless communism" abroad and blacks, minorities and unions at home. There is a desire by the American rulers to recreate the reactionary environment of the 1950's--the first and last decade of the American century--a period pre-Vietnam, pre-"sexual liberation," pre-civil rights movement and above all pre-American capitalism's loss of world economic and military hegemony.

As Marxists, amici curiae are defenders of democratic rights, recognizing the root cause of the contraction of constitutionally protected rights lies in class nature of the state. Harold Laski explains in his treatise The State in Theory and Practice (1935):

> "...how accidental was the union of capitalism with democracy. It was

the outcome, not of an essential harmony of inner principle, but of that epoch in economic evolution when capitalism was in its phase of expansion. It had conferred political power upon the masses; but it was upon the saving condition that political power should not be utilized to cut at the root of capitalist postulates. It would offer social reforms so long as these did not jeopardize the essential relations of the capitalist system. When they did as occurred in the post-war [World War I] years, the contradiction between capitalism and democracy became the essential institutional feature of Western civilization."

As materialists, amici curiae understand that attempts today to proscribe sexuality and particular sexual practices (and their depiction in pornography) necessarily reflect the attitudes, values and prejudices shaped by this class society. Most prominent is the hypocritical glorification of the monogamous family unit, which Marxists have classically defined as the main Western social institution oppressing women. The "family values" the pornography police claim to

uphold are in fact justification for depriving women of equal status not only in the market place but in relation to their own bodies.

The purported reverence for the family reeks with hypocrisy. Families have been destroyed by waves of deindustrialization, slashing of social programs and all-sided attacks on the trade unions, the poor, blacks, aged and the young. The rallying call of the anti-pornography bigots and Moral Majorities to "save the children" has spawned a five-year witchhunt against day-care centers, desperately needed by working women. Meanwhile enormous suffering has been inflicted on the children of this country--from infancy to adolescence, children are the largest section of the American population hit by the economic austerity enforced by both Republicans and Democrats.

Pre-eminent American novelist and social commentator, Gore Vidal has aptly stated "sex is politics" noting that the

> "sexual attitudes of any given society are the result of political decisions... Today Americans are in a state of terminal hysteria on the subject of sex in general and of homosexuality in particular because the owners of the country regard the family as the last means of control over those who work and consume."
>
> Gore Vidal, "Sex Is Politics," The Second American Revolution (1982).

Those whose private sexual life does not conform to the official values of "Judeo-Christianity" and this capitalist state are subject to heavy penalties, as the decision of this Court upholding sodomy laws in Georgia--which specifically made reference to Biblical tradition--made clear.[1] Censoring sexual expression via video, print or photograph is a continuation of this sex witchhunt.

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[1] Bowers v. Hardwick, __U.S.__, 106 S. Ct. 2841 (1986).

The Spartacist League has a long-standing position against government regulation of private life. As stated in the Spartacist League document Youth, Class and Party (1971), "...we call for an end to all laws against what are known as 'crimes without victims' (e.g., prostitution, pornography, gambling, drug addiction, anti-liquor laws).... Laws against gambling and various sexual practices reflect official puritanism allied to organized religion, which acts as an important ideological pillar of capitalism, convincing the masses there can be no happiness this side of the grave."

The shameful hypocrisy of this system of state-enforced oppression of women is revealed by the existence of prostitution, the inevitable companion of the enforced monogamy of the family. Certainly some pornography reflects the frustrations and hostilities engendered

by this repressive society. Amici curiae do not advocate any particular sexual practices, but define their position essentially in the negative: against this state's attempts to censor, limit and cripple human sexual expression in the service of its own reactionary ideology. This follows the classic Marxist tradition, as expressed by Frederick Engels over one hundred years ago in The Origin of the Family, Private Property and the State (1884):

> "Thus, what can we conjecture at present about the regulation of sex relationships after the impending effacement of capitalist production is, in the main, of a negative character, limited mostly to what will vanish. But what will be added? That will be settled after a new generation has grown up: a generation of men who never in all their lives have had occasion to purchase a woman's surrender either with money or with any other means of social power; and of women who have never been obliged to surrender to any man out of any consideration other than that of real love, or to refrain from giving themselves to their beloved for fear of the economic consequences. Once such people

> appear, they will not care a rap about what we today think they should do. They will establish their own practice and their own public opinion, conformable therewith, on the practice of each individual--and that's the end of it."

People have the right to read or look at whatever they want, to write, paint or film it too, and to engage in whatever sexual practices (or none at all) they choose, so long as they're consensual. The point is neither to proscribe, nor prescribe, what kind of sex people "should" have. As the Marxist historian Isaac Deutscher noted at a 1966 Socialist Scholars Conference:

> "We do not maintain that socialism is going to solve all predicaments of the human race. We are struggling in the first instance with the predicaments that are of man's making and that man can resolve.
>
> "May I remind you that Trotsky, for instance, speaks of three basic tragedies--hunger, sex, and death---besetting man. Hunger is the enemy that Marxism and the modern labor movement have taken on.
>
> "Yes, socialist man will still be pursued by sex and death; but we are

> convinced that he will be better equipped than we are to cope even with these.... We do not see in socialist man evolution's last and perfect product, or the end of history, but in a sense only the beginning of history."

For the reasons set forth above the Spartacist League and Partisan Defense Committee are compelled to submit this Brief Amici Curiae in support of the petitioners.

STATEMENT OF CASE

The issue presented in these cases is whether the government can criminalize First Amendment communicative materials, seize and destroy them and imprison their distributors--simply by alleging "obscenity". That is what the State of Indiana did do, and what the federal government intends by making "obscenity" a predicate offense under RICO[2]. In these cases the

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[2] Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. sec. 1961, et seq., particularly the

government applied the most powerful weapon in its legal arsenal to an area of social concern inseparably connected to humanity's most public and most private worlds--opinion and sex. The case does not come before this Court without history or context.[3] There is a call to arms against constitutional rights. The current battleground is personal freedoms--focused on the three-letter word "sex." The battle cry of the government and its religious surrogates is the "pro-

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forfeiture provisions of sec. 1963. In 1984, Congress amended section 1961 (1) to include obscenity offenses in the definition of racketeering activity. The Indiana RICO statute is modeled after the Federal RICO statute and is similar to the RICO statutes in many other cases.

[3] The Attorney General's Commission of Pornography, Final Report, July 1986, made 93 recommendations including targeting cable and satellite TV for obscenity prosecutions, using RICO laws to prosecute and seize the assets of obscenity targets, and most ominously calling for the creation of private groups to challenge most communicative materials from erotic magazines to videotapes.

tection of morality, family, children."

These cases represent government's frontal assault on First Amendment protection of the spoken and written word, books, films, and the right to publish and distribute communicative material. The starting point is the current majority position of the Supreme Court that the First Amendment in not an absolute--that an "obscenity" exception exists. The established tests for "obscenity" are subjective, imbued with religious considerations, and justified on the basis of a false history of the First Amendment obscenity exception.

Until now, it has been a principle of constitutional law that communicative material is protected by the First Amendment and is not "obscene" until there has been a judicial determination. Even where materials are considered "obscene," due process mandates apply. This is

axiomatic, a minimum condition for the First Amendment to have meaning.

The application of RICO provisions to anti-obscenity laws abrogates First Amendment protection for communicative materials. Under RICO an ex parte ruling of probable cause that two or more individual items are "obscene" can legally justify the seizure of all other First Amendment materials owned by the alleged offender, without a trial or judicial determination. The prosecutor can choose venue in order to best secure initial forfeiture and then conviction.

Thus these cases pose in stark relief whether the First Amendment is fact or fiction; whether by an Orwellian turn of phrase books, magazines, and video movies can be transformed from First Amendment materials to fruits of racketeering.

LEGAL ARGUMENT

THE INDIANA RICO STATUTE IS UNCONSTITUTIONAL IN VIOLATION OF THE FIRST AMENDMENT WHEN APPLIED BASED ON PREDICATE "OBSCENITY" OFFENSES

The First Amendment rights are intertwined and indivisible, part of a whole. The First Amendment encapsulates the philosophy of the enlightenment in opposition to the philosophy of obscurantism, the breaking of feudal fetters on political freedom, economic freedom, religious freedom and scientific freedom.

The First Amendment is a unified totality, the "text is indeed both general and absolute. In one sentence it separates church and state and guarantees free opinion." [4]

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[4] Franklin, "Infamy and Constitutional Civil Liberties," Lawyers Guild Review, Vol. XIV, No. 1, p. 3 (1954)

"The First Amendment is the keystone of our Government, that the freedoms it guarantees provide the best insurance against destruction of all freedom," Mr. Justice Black, dissenting in Dennis v. United States, 341 U.S. 494, 580 (1951).

The First Amendment is unified in its various clauses by the central liberty of freedom of the individual in matters of thought and conscience--whether the concerns are political, religious or social.[5] The legal force of the

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[5] In Prince v. Massachusetts, 321 U.S. 158, 164 (1944), the Court wrote: "If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. Schneider v. State, 308 U.S. 147; Cantwell v. Connecticut, 310 U.S. 296. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. but they have unity in the charter's prime place because they have unity in their human sources and

First Amendment applied only to the federal government until the battlefields of the Civil War, defeating slavery, provided the basis for a national American state. Legally this was codified in the Reconstruction Amendments, the Thirteen, Fourteenth and Fifteenth Amendments to the U.S. Constitution, subordinating subordinating the state governments to these democratic principles. See, Gitlow v. New York, 268 U.S. 652 (1925), Cantwell v. Connecticut, 310 U.S. 296 (1940).

Constitutional history discloses that particularly when the populace is being prepared for war, the protections

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functioning." See also, Widmar v. Vincent, 454 U.S. 263, 268 (1981), Wallace v.Jaffee, 472 U.S. (1985). "The great bulk of human affairs and human interests is left by any free government to individual enterprise and individual action. Religion is eminently one of these interests, lying outside the true and legitimate province of government." Board of Education v. Minor 23 Ohio St 211,253 (1872) quoted approvingly in Abington School District v. Schempp, 374 U.S. 215, n 7 (1963).

of the First Amendment are ignored.[6] And, in the midst of a national hysteria around AIDS, in Bowers v. Hardwick, __U.S.__, 106 S. Ct. 2841 (1986) this Court upheld Georgia's sodomy law, crimi-

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[6] The Bill of Rights was less than a decade old in 1798 when war hysteria prompted the Federalist-dominated Congress to enact the Alien and Sedition Acts. Constitutional challenges to the Acts were generally precluded in the federal courts. During World War I, the Espionage Act of 1917 and the Sedition Act of 1918 were passed and then upheld by the Supreme Court in Schenck v. United States, 249 U.S. 47 (1919). In 1940 Congress, concerned with the increased possibility of United States entry into World War II, passed the Alien Registration Act (better known as the Smith Act). The first to be prosecuted were the Trotskyists of the Socialist Workers Party. The convictions for conspiring to overthrow the government by force and violence were affirmed by the Court of Appeals, Dunne v. United States, 138 F2d 137; 320 U.S. 790 (1943), and the Supreme Court refused review. The internment of American citizens of Japanese descent during World War II, Korematsu v. United States, 320 U.S. 214 (1944) is a notorious example. Post-World War II, during the McCarthy anti-communist witchhunts, members of the Communist Party were convicted under the Smith Act, Dennis v. United States, 341 U.S. 494 (1951).

nalizing particular sex acts between consenting adults, homosexuals and heterosexuals alike, in the privacy of home.

However, judicial claims that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance,"[7] are simply and clearly erroneous. There is no judicial precedent from British common law or the new American republic regarding prosecution of obscenity. There is no evidence the founding fathers ever considered sexually obscene speech or writings an offense. Reported common law prosecutions were based not on concerns of sexual improprieties but political and religious themes, particu-

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[7] Roth v. United States, 354 U.S. 476, 484 (1957) and cases cited therein at pps. 481-485; Miller v. California, 413 U.S. 15, 20 (1973).

larly an attack on the state religion.[8] The earliest licensing systems begun by Henry VII in 1538 were primarily addressed to the vices of sedition and heresy.[9] The eighteenth-century decisions generally relied on as the basis of our obscenity prosecutions instead establish the political nature of these cases.[10]

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[8] In Schroeder, "Obscene Literature at Common Law," 69 Albany L.J. 146 (1907) it is argued that, "Since England had an established church, naturally anything (including the so-called obscene publications) which discredited the official religion would also be held libelous...From the suppression of 'obscene impiety,' has erroneously grown the notion that all so-called 'obscene' literature was suppressed at common law."

[9] See, generally Alshuler, "Origins of the Law of Obscenity," in 2 Technical Report of the Commission on Obscenity and Pornography 65 (1970).

[10] See, Reynolds, "Our Misplaced Reliance on Early Obscenity Cases." 61 A.B.A.J. 220, 222 (1975). "Obscenity was not viewed by the courts as terribly serious matter. Sedley's [Sir Charles Sydles Case, 1 Keble 620, 1663] true offense was breach of the peace and inciting a riot [Sedley disrobed, harangued his audience with antireligious epithets as he showered them with bottles

At the time of the American Revolution there was no common law obscenity and only one state had any statutory law and that was most likely directed against religious blashemy.[11] With that excep-

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of urine]. Curll [Dominus Rex v. Curl, 2 Strange 788, 1727] had antagonized the government, and Wilkes [4 Burr. 2527, 1770] was first on the cabinet's list of political enemies. Read, the only defendant whose case involved simply a vulgar book, was acquitted in the higher court. The chief offender in this literature, Fanny Hill, had great vogue and was not prosecuted....Although the three affirmed convictions were political, our courts have overlooked that and have considered them the foundation of obscenity prosecutions. The basis of Read's acquittal is that no one was hurt and the peace was not broken. The 1970 obscenity commission returned to that viewpoint, seeing no harm in the distribution of sexual materials among consenting adults. The judges in the Read case said the offense, if any, was spiritual, not temporal. Of course, we have no ecclesiastical courts, but as to Fanny Hill, the commission would advise, in effect, as does the ghost concerning Hamlet's mother: 'Leave her to heaven.'"

[11] In 1711, Massachusetts had a censorship system which included the "wicked, profane, impure, filthy and obscene..." Ancient Charter, Colony Laws

tion, at the time of the adoption of the Constitution and Bill of Rights, the states had no law excluding "obscenity" from the regime of freedom of expression and press that then existed. Thus, in the words of Mr. Justice Douglas "the creation of the 'obscenity' exception to the First Amendment was a legislative and judicial tour de force."[12]

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and Province Laws of Massachusetts Bay, 1814. See, Schroeder, supra, at 149, "A further confirmation of our conclusion that the common law of England and America knew of no such crime as circulating obscene literature except when it was of the particular kind which directly discredits religion, we may point to the law-book writers of the time, who uniformly classified it as an offense against God, not at all as one of any other direct consequences to the civil order. With the creation of our secular commonwealths, wherein a union of church and state is forbidden, our constitutions have repealed all the common law offenses against God. Writers such as Blackstone make no mention of such an offense except as an offense against God."

12 Paris Adult Theatre I v. Sloan, 113 U.S. 49, 70-71, (1973) (Douglas, J., dissenting). See, Goebel, Development of Legal Institutions (1946).

Furthermore, the First Amendment was, until the adoption of the Fourteenth Amendment, a restraint only upon federal power. There is an absence of any federal cases or laws relative to obscenity in the period immediately after the adoption of the First Amendment.

Criminalization of purportedly obscene writings has significantly peaked at key periods of social change. Only four states made obscenity the object of the criminal law prior to the Civil War, and a federal customs law aimed at the French post card trade was passed in 1842 which excluded printed matter from regulation. These statues were not rigidly enforced. In 1821 a Massachusetts bookdealer was sentenced to six months in jail for selling Fanny Hill to local farmers. The few obscenity cases prosecuted between 1821 and 1870 were general-

ly guides to marital sex containing contraceptive information.

It was not until the period of post-Reconstruction reaction that Congress passed legislation relating to obscenity. After the Civil War, mass printing, literacy, second-class postal rates, combined with the presence of single men living outside family supervision in the cities provided a market for sexual commerce. "An Act for the Suppression of Trade in, and Circulation of Obscene Literature and Articles of Immoral Use," had as its object the specific prohibition of advertising and mailing of birth control information.[13]

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[13] This Act, 17 Stat 599 (1873), was promulgated by one Anthony Comstock who personally supervised its enforcement as an unpaid postal inspector. In 1875 alone he led forty-seven arrests, twenty-eight convictions and ninety-one hundred fines. Comstock destroyed something over fifty tons of vile books [and] 3,984,063 obscene pictures. It took the concerted campaign of Margaret Sanger to make birth control information available to women to

As late as 1948, the Court could say that many state obscenity statutes had "lain dormant for decades." Winters v. New York, 333 U.S. 507, 511 (1948). It was not until 1957 in Roth v. United States, 354 U.S. 476 (1957) that the issue "whether obscenity is utterance within the area of protected speech and press" was "squarely presented" to this Court.

In Roth this Court held that certain expression is "obscene" and thus outside the protection of the First Amendment while upholding individual books, such as classics like Fanny Hill, as not being "obscene."[14] Post World War II, Cold War politics found expression in sexual poli-

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defeat Comstock and his cronies in the Societies for the Suppression of Vice, Women's Christian Temperance Union, and the YMCA, forty years later.

[14] Memoirs v. Massachusetts, 383 U.S. 413 (1966).

tics--preoccupation with family stability, "internal subversion," "moral fiber" and "decency." The focus of the Courts turned to commercial distribution of allegedly obscene materials--books, magazines, and more recently video movies.

This Court has not found it possible to arrive at an objective legal standard of obscenity. The court established standards are imbued with religious, moral and subjective literary determinations. From the initial formulation defining "obscenity" in Roth v. United States, supra[15] until this Court's decision in Miller v. California, 413 U.S. 15 (1973), no majority of the Supreme Court has at any given time been able to agree

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[15] The standard as stated in Roth v. United States, supra, 489 in the opinion written by Mr. Justice Brennan was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power and excepted from the protection of the First Amendment.[16] See, e.g., Redrup v. New York, 386 U.S. 767, at 770-771 (1969).

The "test" set forth in Miller, supra, at 24 is a three-part guideline for the trier of fact: (a) whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest,...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a

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[16] As set forth in Miller, supra, at p. 18-19, this Court has defined "obscene material" as "material which deals with sex in a manner appealing to prurient interest," Roth v. United States, supra,

whole, lacks serious literary, artistic, political, or scientific value."

The absolute failure of the Court established obscenity tests, was addressed by Mr. Justice Brennan dissenting in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 84 (1972):

> "Any effort to draw a constitutionally acceptable boundary on state power must resort of such indefinite concepts as 'purient interest,' 'patent offensiveness,' 'serious literary value,' and the like. The meaning of these concepts necessarily varies with the person defining them. Although we have assumed that obscenity does exist and that we 'know it when [we] see it,' Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between the protected and unprotected speech."
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> "Recognizing that 'freedoms of expression . . .are vulnerable to gravely damaging yet barely visible encroachment,' Bantam Books, Inc., v. Sullivan, 372 U.S. 58, 66 (1963), we have demanded that 'sensitive tools' be used to carry out the 'separation of legitimate from illegitimate speech.' Speiser v. Randall, 357 U.S. 513. 525 (1958). The essence of our problem in the obsce-

nity area is that we have been unable to provide 'sensitive tools' to separate obscenity from other sexually oriented but constitutionally protected speech, so that efforts to suppress the former do not spill over into the suppression of the latter. The attempt, as the late Mr. Justice Harlan observed, has only 'produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.' Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704-705 (1968) (Separate opinion).

"These considerations suggest that no one definition, no matter how precisely or narrowly drawn, can possibly suffice for all situations, or carve out fully suppressible expression from all media without also creating a substantial risk of encroachment upon the guarantees of the Due Process Clause and the First Amendment." Id. at 79-80.

Contrary to the protestations and assertions of the Court that the "States have the power to make a morally neutral judgement" and to criminalize obscenity, Id. at 69, the protection of public de-

cency concept is at bottom religious.[17]

Religious beliefs and determinations of morality cannot dictate what is permissible for man to read, think, fantasize--be it the classics or "smut"; erotica or pornography. Absent physical harm to another, It is no concern of the

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[17] See, Henkin, "Morals and the Constitution: The Sin of Obscenity," 63 Col.L.Rev.391, 392-395 (1963) where it is argued that obscenity laws are not based on any concern for the prevention of sex offenses or other forms of crime, but are "rooted in this country's religious antecedents, of governmental responsibility for communal and individual decency and morality....Communities believe, and act on the belief, that obscenity is immoral, is wrong for the individual, and has no place in a decent society. They believe, too, that adults as well as children are corruptible in morals and character, and that obscenity is a source of corruption that should be eliminated. Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the community and for the salvation and welfare of the `consumer'. Obscenity, at bottom, is not crime. Obscenity is sin."

state. Established First Amendment law does not permit religious or moral determination of "public consensus." West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." Kingsley International Pictures Corp. v. Regents, 360 U.S. 684 (1959) First Amendment protection is "not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax."; Wooley v. Maynard, 430 U.S. 705, 714-15 (1977) that "most individuals agree with the thrust of New Hampshire's motto is not the test; ... [t]he First Amendment

protects the right of individuals to hold a point of view different from the majority and to refuse to foster... an idea they find morally objectionable."

Nor do First Amendment protections depend on whether some majority (or vociferous minority's) concept of "social worth" or "seriousness," Gooding v. Wilson, 405 U.S. 518 (1972), Cohen v. California, 403 U.S. 15 (1971), Terminello v. Chicago, 337 U.S. 1 (1949). "The Constitution protects the right to receive information and ideas," and that "[t]his right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society." Stanley v. Georgia, 394 U.S. 557, at 564 (1969). See Martin v. City of Struthers, 319 U.S. 141, 143 (1943); Winters v. New York, supra at 510; Lamont v. Postmaster General, 381 U.S. 301, 307-308 (1965) (concurring opinion).

This right is closely tied, as Stanley recognized, to "the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy." 394 U.S., at 564. It is similarly related to "right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child" (italics omitted), Eisenstadt v. Baird, 405 U.S. 438, 453 (1972), and the right to exercise "autonomous control over the development and expression of one's intellect, interests, tastes, and personality." (Italics omitted.) Doe v. Bolton, 410 U.S. 179, 211 (1973) (Douglas J., concurring).

There is a right of privacy or liberty in matters related to marriage, family and sex. Griswold v. Connecticut, 321 U.S. 479 (1965), Loring v. Virginia,

388 U.S. 1 (1967), Skinner v. Oklahoma,

316 U.S. 535 (1942).

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They conferred, as against the Government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized man." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J.,dissenting).

These established premises of individual liberty provide the basis that the state can not assert a right to protect the individual from the effects of obscenity. The state's criminalization of what it considers to be obscenity amounts to nothing more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the mandate of the First Amendment.

Moreover, this Court has further left the question of what constitutes obscenity undefinable because the community standard to be applied is not an objective, national one but intended to vary from community to community. In the words of this Court there should not be "fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive"... It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City, Miller v. California, supra, at 30, 32. Thus prior to judicial determination what is purportedly obscene or not is cannot be known.

Obscenity is a wholly improper predicate RICO offense. The mere allegation that communicative material is obscene

starts the process of the draconian RICO punishment and forfeiture scheme, allowing First Amendment materials not even alleged to be proscribed to be seized. RICO, therefore comprises a constitutionally impermissible prior restraint of protected First Amendment materials. Any system of prior restraints of expression bears a heavy presumption against its constitutional validity. It is tolerated only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint, Near v. Minnesota, 283 U.S. 691, 720-721 (1931).

RICO sanctions violate longstanding constitutional solicitude for sexually explicit expression that does not fall into the circumscribed category, Jenkins v. Georgia, 418 U.S. 153 (1974). When seeking to restrict the dissemination of

unprotected obscenity, government "is not free to adopt whatever procedure it pleases without regard to the possible consequences for constitutionally protected speech," Marcus v. Property Search Warrant, 367 U.S. 717, 731 (1961).

The Supreme Court has repeatedly stressed that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed or punished, is finely drawn. ... The separation of legitimate from illegitimate speech calls for...sensitive tools," Speiser v. Randall, 357 U.S. 513, 525 (1969). The First Amendment principle applies with particular force when government regulates obscenity. "[C]onstitutionally protected expression...is often separated from obscenity only by a dim and uncertain line," Bantam Books v. Sullivan, 372 U.S. 58,66 (1963). Given this indeterminacy, a statutory scheme,

such as RICO, drawn without appropriate precision and sensitivity to First Amendment principles risks punishing and deterring a substantial range of protected expression. RICO is a mallet, not the "sensitive tool" required by this Court.

In evaluating the extent to which a particular regulation will "chill" protected expression, the Supreme Court has directed courts to consider the precision with which the government has defined the proscription. Ambiguous or sweeping proscriptions will cause potential speakers to self-censor out of inability to determine what expression will lead to official sanction. Speiser v. Randall, supra; Thomas v. Collins, 323 U.S. 526, 535 (1945). The Supreme Court has also directed courts to consider the severity of punishment imposed for transgressing the prohibition, New York v. Ferber, 458

U.S. 747, 774 (1982). Punishment chills more as it becomes more severe.

These well-established principles require invalidation of the RICO statute as applied based on obscenity crimes. RICO is certain to chill a vast amount of constitutionally protected expression. The statutory scheme is both vague in the scope of its proscriptions and draconian in the severity of its punishments.

Because only a "dim line" separates obscenity from protected expression, obscenity regulation necessarily imposes uncertainty upon potential speakers. Miller v. California, supra explicitly incorporates variable local community standards in the determination whether material is determined obscene. But the scope of RICO's definition of "pattern of racketeering activity" compounds the uncertainty exponentially. RICO's nationwide scope poses grave dangers for an

entity engaged in nationwide distribution of materials containing some sexual content. Expression that the vast majority of communities would consider appropriate might nonetheless be found to be obscene in one or two communities. Under RICO, two such findings of obscenity subject the distributor to criminal liability that includes forfeiture of the entire nationwide business. Moreover, there is no way to discern or predict reliably the standards of small communities in distant parts of a state or the country. RICO places power in the hands of local prosecutors far in excess of that traditionally given in the evolved law of obscenity. "Just as ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of a work vary from community to community based on the degree of local acceptance

it has won." Pope v. Illinois, 107 S.Ct. 1918,1921 (1987).

The severity of RICO's punishment scheme also exerts a powerful chilling effect. The RICO forfeiture provision taints the income received from all sexually explicit expression, because two isolated examples of that expression might later be found to be "obscene" in a single community anywhere in the state or country. Any person who derives income from the proceeds of such expression is at risk not only of prolonged imprisonment and huge fines, but also the forfeiture of his entire enterprise, if that enterprise either received such proceeds, or was involved in the production, transportation, or dissemination of the expression.

Either the scope of the proscription or the severity of the punishment alone imposes a sufficient chill on free ex-

pression to require invalidation of the statute. In RICO, however, the two effects merge. A potential speaker must confront not only the indeterminacy of RICO's substantive scope but also the daunting risk of draconian penalties, including forfeiture of virtually all assets if the speaker errs in estimating what speech will fall on the protected side of the First Amendment line. Unlike those who engage in other activities targeted by RICO, the distributor of such materials in all likelihood is engaging in activity he not only deems not illegal, but in fact protected by the First Amendment. Notwithstanding, based upon the prejudices of local prosecutors, and without benefit of a full judicial determination, RICO paints such distributor with the brush of "racketeering" and the full brunt of its draconian sanctions.

The application of RICO to obscenity will thus have a chilling effect on protected expression unprecedented in its breadth. For all the reasons set forth above, this Court should therefore declare the extension of RICO to obscenity crimes unconstitutional.

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Respectfully submitted,

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